



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Eagle Research Group, Inc.

**File:** B-230050; B-230050.2

**Date:** May 13, 1988

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### **DIGEST**

1. Protest that the awardee obtained confidential information from the contracting agency's computerized information system while working as a contractor with the agency on an earlier contract and unfairly used that confidential information to improve its proposal in the present, protested procurement is denied, where the protest is based solely on the protester's conjecture that the awardee could have cheated to win the contract award and there is no evidence in the record to support the protester's allegation.
2. Protest that the awardee had a conflict of interest which should have precluded award to it is denied, where the record contains no evidence to support the protester's allegation. The protester's mere conjecture of an actual or potential conflict of interest, without factual support, provides no basis to invalidate the award.
3. Where the solicitation stated that the technical quality of a proposal was more important than the cost, and the agency reasonably determined that the awardee's proposal was significantly technically superior to the protester's proposal (rated approximately 19 percent higher by the evaluators), the agency properly awarded the contract to the awardee, even though its proposed price was approximately 2 percent higher than the protester's proposed price.

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### **DECISION**

Eagle Research Group, Inc., protests award of a contract to Meridian Corporation by the Department of Energy (DOE) pursuant to request for proposals (RFP) No. DE-RP01-87DP50066. The contract requires Meridian to provide technical support

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services to the Assistant Secretary for Defense Programs, Office of International Security Affairs (OISA), related to analyses of arms control and nuclear nonproliferation issues and verification technology development. Eagle alleges that Meridian had an unfair advantage over Eagle in this competition, because Meridian had access to certain confidential DOE information (for example, budget amounts) that could have been used to develop Meridian's winning proposal. Eagle further alleges that Meridian won the competition because one of its current employees was employed by DOE as the contracting officer's technical representative (COTR) when the solicitation was issued. According to Eagle, this was a clear conflict of interest which allowed the COTR to provide Meridian with source-selection-sensitive information, including Eagle's own proposal information, and to influence the outcome of the competition so that award would be made to Meridian. Eagle also contends that the evaluation and award decision were not made in conformance with the evaluation factors set forth in the RFP.

We deny the protest.

The solicitation was issued on June 18, 1987, with a July 20 closing date for submission of initial proposals. The RFP invited proposals for providing technical support services to OISA in furtherance of its mission to protect critical facilities, materials and information necessary for the national defense. The contractor would assist OISA in programs such as: developing policies and procedures to ensure protection of nuclear weapons, nuclear facilities and classified information, against possible theft, sabotage and terrorist activity; security investigations, including granting of security clearances to DOE and DOE contractor personnel for performance of defense related work; and verification and control technology to develop means of detecting and measuring nuclear weapons activities and to evaluate arms control proposals, export license applications, technology transfer issues, and foreign-related activities. The RFP stated that a cost-plus-fixed-fee, level-of-effort contract would be awarded for a base period of 3 years, with two 1-year options. The RFP informed offerors that the technical quality of proposals was more important than cost considerations for award purposes.

Eagle had been involved in doing the same or similar work for DOE as either a subcontractor or a prime contractor since 1978, and was the incumbent contractor until award was made to Meridian under the present procurement. Eagle and Meridian were the only two offerors to submit proposals in response to the RFP. After initial proposals were evaluated, the procurement selection official determined that both proposals were in the competitive range. While

DOE determined that Meridian's proposal was technically superior to Eagle's proposal, DOE considered both proposals to be of good quality because neither had any major weaknesses or required clarification. Therefore, oral discussions confined to cost matters were conducted with both offerors. Subsequent to discussions, both offerors submitted revised offers. As neither offeror revised its technical proposal, the technical ranking of proposals remained unchanged.

DOE had the Defense Contract Audit Agency (DCAA) perform an audit on both Eagle's and Meridian's cost proposals, and conducted its own cost evaluation of the proposals, before negotiating with offerors on the bases of the cost analyses. Each offeror then submitted a best and final offer (BAFO). Eagle's BAFO proposed a total price of \$5,112,075 for the potential 5-year contract period, while Meridian's total proposed price was \$5,216,091. Because Meridian's proposal had received a significantly higher technical score, while Meridian's proposal was only \$104,016, or 2 percent, higher in cost, DOE awarded the contract to Meridian on January 12, 1988. Eagle protested to our Office on January 19.

Eagle contends that Meridian should have been excluded from this procurement because Meridian had an organizational conflict of interest. According to Eagle, Meridian had been awarded a contract by DOE in 1985 to provide technical support services to OISA and to DOE's Office of Classification, and was still performing under that contract for DOE at all times pertinent to the present protest. Eagle believes that Meridian had access to much DOE information that was not available to Eagle and the general public, and that Meridian used that information to improve both its cost and technical proposals. Eagle asserts that Meridian's use of DOE confidential information (such as budget amounts, estimated costs, electronic mail, travel expenses, proposed staffing levels, etc.) was a violation of the "Organizational Conflicts of Interest-Special Clause (Department of Energy Acquisition Regulation (DEAR) § 952.209-72 (April 1984)), which was included in both Meridian's 1985 technical support services contract and the contract awarded under the present solicitation.

DOE responds that, prior to awarding this contract to Meridian, it made a determination that Meridian had no organizational conflict of interest that prevented award of the contract to the firm. DOE admits that certain budget information is entered into its computerized information system and that Meridian did program that computer system in its capacity as a DOE contractor. However, DOE points out, its computer information system is maintained by OISA staff, not Meridian employees, and no specific budget information

concerning individual planned contracts is stored in the system. DOE reports that Meridian therefore did not have direct access to any relevant budgetary information by virtue of its role as a DOE prime contractor. While DOE does admit that an incumbent contractor (including Eagle) could have gained access to the computer system and obtained government cost estimates or travel information relevant to this procurement, DOE argues that there is no evidence that Meridian or anyone else did so. DOE also reports that the computer data base contains no information on staffing levels. Finally, DOE states that its computerized information system does not have electronic mail capability, and, in any event, all communications among members of the technical evaluation panel on this procurement were held in the utmost confidence and stored in a secured area of OISA.

The "Organizational Conflicts of Interest-Special" clause to which the protester refers states that its primary purpose is to ensure that a DOE contractor (1) is not biased because of its past, present, or currently planned interests, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance under a DOE contract. Regarding access to information while performing under a DOE contract, the clause states in part that:

"If the Contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93-579), or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval of the Contracting Officer it shall not: (a) use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is release or otherwise made available to the public . . . ." DEAR § 952.209-72(b)(2)(i).

In our view, the above-quoted clause does not, as Eagle argues, prevent a firm having a contractual relationship with DOE from competing for another contract with the agency. Even though the contractor might have access to confidential information, the clause elsewhere specifically states that a technical support contractor shall not be precluded from competing for follow-on technical consulting contracts, unless the new requirement stems directly from the contractor's performance under a DOE contract or the

contractor wrote the statement of work for the follow-on contract. The present procurement was not a follow-on contract. Further, in our view, the fact that the clause specifically provides that a DOE contractor properly may compete for the follow-on work illustrates that the clause is not meant to be a blanket exclusion of DOE contractors with access to DOE confidential information from all future procurements for similar work. Moreover, we note that Eagle, as the incumbent contractor, also could have had access to DOE confidential information, but under the conflicts of interest clause was eligible to compete for the follow-on contract.

The issue, then, is not whether Meridian had access to DOE's confidential information, but whether Meridian obtained such information and used it to improve its competitive standing in the present procurement. Eagle has proffered no evidence that Meridian used information it obtained through its contractual relations with DOE to make its proposal more attractive on the basis of either technical merit or cost. Rather, all that has been presented by Eagle are conjecture and self-serving statements as to how Meridian could have cheated to win this contract award. In response to these allegations, Meridian has stated that it "did not use, and could not have used, to its advantage any information obtained as a result of the 1985 OISA contract in preparing its initial bid or any other submission made in this procurement." Further, we have examined the record and find nothing to show that Meridian used its contractual relationship in a manner that violated the conflicts of interest clause or otherwise managed to secure an unfair advantage for itself in this competition. In view of the lack of any evidence in the record to support the protester's charges, and because of DOE's precautions to make sure that no procurement-sensitive information was leaked to Meridian, as well as DOE's report that most of the information that Eagle guesses Meridian obtained from the DOE computer data base was not in fact stored in the computer, we find no merit in Eagle's position.

Eagle next alleges that the entire procurement process was tainted because the DOE employee who was the COTR during the early stages of the procurement process resigned from DOE and began working for Meridian several months before the contract was awarded to Meridian. Eagle charges that this individual orchestrated the entire procurement process in a manner designed to wrest the contract from Eagle and to award the contract to his future employer, Meridian, fully intending to resign from DOE and to go to work for Meridian. Eagle attributes a host of alleged improper activities to the former COTR, including: (1) not setting the procurement

aside for small businesses so that Meridian, a large business, would be eligible; (2) obtaining evaluation reports/materials from the evaluators and proprietary information from Eagle's proposal and giving the information to Meridian so that Meridian could improve its proposal; (3) soliciting a female employee of Eagle to "fix him up" with another female Eagle employee while he was still employed by DOE; and (4) having a "close personal relationship" with a female member of the Meridian professional staff. Basically, Eagle charges that the COTR had a serious conflict of interest and that he used his DOE position and influence to steer the award to Meridian.

As in any protest, it is the protester that must bear the burden of proof to show that the actions of the former government employee were improper, tainted the procurement process, or worked to the competitive prejudice of the protester. See Conceptual Systems, Inc., B-227018, July 14, 1987, 87-2 CPD ¶ 43.

DOE acknowledges that the individual in question worked in his capacity as COTR with the DOE Office of Procurement Operations to develop the RFP. As a representative of OISA, his responsibilities were to develop the statement of work, the technical requirements, the evaluation criteria, and a general cost estimate based upon the work requirements. DOE reports that its Office of Procurement Operations made the decision not to set this procurement aside for exclusive small business participation primarily because only one small business, Eagle, had bid on the last open competition for this work, and that the COTR did not influence this decision. DOE argues that, even though the COTR did not resign from the agency until October 24, 1987, the COTR "disassociated" himself from the procurement totally after the closing date for submission of initial proposals, had absolutely no contact with technical evaluation panel members regarding the evaluation of proposals, and was not privy to information in the hands of evaluators or communications among the evaluators. DOE emphasizes that the COTR had no role in the selection of Meridian and that his participation was limited to the above-listed activities, which took place in the very early stages of the procurement.

DOE further reports that it closely examined the DCAA audits performed on both proposals, and conducted its own thorough cost evaluation of the individual cost elements of the proposals. DOE states it was able to determine with specificity which cost elements of each proposal to question and to negotiate on that basis and, accordingly, DOE got

Meridian to lower its proposed price significantly, even though it was still \$104,016 higher than Eagle's proposed price.

In sum, DOE argues that the protester has failed to present any evidence of wrongdoing by the COTR and contends that Eagle's assertions--especially with regard to the COTR's social relationships with Meridian employees--are based solely on innuendo and rumors.<sup>1/</sup>

At the protester's request, our Office convened a conference on the merits of this protest. We specifically requested that Meridian bring the former COTR to the conference, and Meridian complied with our request. In response to our inquiries, the former COTR vehemently denied that he ever obtained or passed to Meridian any Eagle proprietary information or any evaluation materials. He stated that he did not consult with the evaluators at any time after he began discussing future employment with Meridian and that he never dated or had an intimate relationship with female employees of either firm. The former COTR also responded to us that he was hired by Meridian to a position that isolated him from any involvement with preparation of the Meridian proposal or performance under this contract. Eagle did not question this individual about his allegedly obtaining information on behalf of Meridian, influencing the evaluators, or his requesting to be "fixed-up" with any female employees. Furthermore, Eagle did not confront the former COTR with the Eagle employee to whom the former COTR allegedly made his remarks concerning his desire to get "fixed-up."

In our opinion, the protester has failed to carry its burden of proving that there was any wrong-doing on the part of the COTR, the evaluators, the source selection official, or any other DOE personnel. While the protester contends that its hands are tied because all of the pertinent evidence is contained in documents that DOE has not released to it, we have examined those documents and find nothing to support Eagle's very serious allegations. Furthermore, the protester would have us infer from the very fact that the COTR left DOE to work for the eventual awardee that the COTR carefully plotted a plan and proceeded along a course of action designed to take this contract from Eagle and award it to Meridian. This we will not do. Mere inferences of actual or potential conflicts of interest do not afford a

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<sup>1/</sup> Nevertheless, because of the protester's persistence, DOE has turned the matter over to the DOE Inspector General for review.

basis for disturbing a contract award; there must be hard facts showing an actual conflict of interest. Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17. Here, the protester has not produced any solid evidence to support its allegations. Thus, the protester's conjecture provides no basis to invalidate the award to Meridian. See Conceptual Systems, Inc., B-227018, supra.

Finally, Eagle contends that the evaluation of proposals was not made in conformance with the evaluation criteria set forth in the RFP. Eagle states that it was advised by DOE personnel at a debriefing conference that its technical proposal and Meridian's technical proposal were very closely rated in all areas but one. This one element, which Eagle believes was the key that gave Meridian the advantage leading to its selection for award, has been labeled the "visionary element" by Eagle. Eagle believes that, but for the higher score Meridian received on the "visionary element," Eagle's proposal would have been chosen for award based upon its lack of any deficiencies, its technical equivalency with Meridian's proposal, and its lower proposed price. Eagle contends that the "visionary element" represents a departure from the RFP's evaluation scheme and that, if this element was a key evaluation criterion, it should have been listed as an evaluation factor in the RFP.

The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. KET, Inc., B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429. Here, we cannot find that the DOE's decision to select Meridian's proposal over Eagle's was unreasonable under the stated evaluation scheme.

The solicitation stated that award would be made to the responsible offeror whose conforming offer was determined to be most advantageous to the government, "cost or price and other factors, specified elsewhere in this solicitation, considered." The RFP also specified that the technical proposals would be evaluated on the basis of four criteria and their subcriteria, which were listed in descending order of importance as follows:



Criterion 1: Personnel

- A: Personnel Qualification
- B: Availability of Personnel

Criterion 2: Technical Approach

- A: Understanding the Statement of Work
- B: Technical Approach

Criterion 3: Corporate Qualifications

- A: Corporate Experience
- B: Corporate Resources

Criterion 4: Organization and Management Capabilities

- A: Management Planning and Control
- B: Organizational Structure

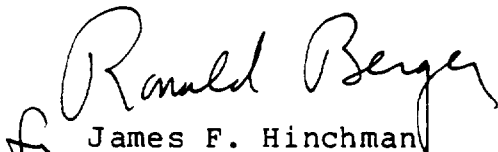
Eagle states that it left the technical debriefing conference believing that its proposal had been evaluated as essentially equal to that of Meridian in all areas except for the "visionary element" and that this criterion was not set out in the RFP as an evaluation factor. Regardless of Eagle's impressions after the debriefing, it is not true that there was no RFP evaluation factor under which the evaluators properly could rate proposals for their "visionary" approaches or lack thereof or, moreover, that the technical proposals were only rated as significantly different on this element alone. The RFP specifically stated that proposals would be evaluated for their "innovativeness" as part of the evaluation of the technical approach offered. While the DOE representative at the debriefing conference may have used the word "visionary" to describe this advantage of the awardee's proposal, we believe the term reasonably falls within the meaning of the term "innovativeness" as used in the RFP, and that offerors were adequately informed of this aspect of the evaluation.

Our examination of the evaluation reports, including the evaluators' scoresheets and narrative discussions, reveals that Meridian's proposal was rated as significantly superior to Eagle's proposal. Overall, Meridian's proposal received a rating of 943 points (out of a perfect score of 1,000) to Eagle's 793 points. Meridian's proposal was rated as significantly superior to Eagle's under the personnel qualification, technical approach, and corporate qualifications evaluation criteria. The proposals were rated equal only under the organization and management criterion. Among other things, the evaluators found Eagle's technical approach to be adequate, even though its equipment

and computer support appeared to be limited, and that its personnel generally met the requirements of the contract. On the other hand, the evaluators were very much impressed by Meridian's proposal because it was "imaginative," "forward looking," and fully demonstrated how Meridian would meet the future needs of DOE; they were equally impressed with Meridian's corporate resources, including its equipment and computer equipment; and the evaluators believed that virtually all of Meridian's proposed personnel substantially exceeded the RFP's requirements. Thus, while Eagle's proposal was considered to be good, Meridian's was considered to be better.

In sum, we believe that DOE's technical evaluation was reasonably based and was consistent with the RFP evaluation scheme. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321. In view of the fact that Meridian's technical rating of 943 points was approximately 19 percent higher than Eagle's technical rating of 793 points, while Meridian's proposed price was only about 2 percent higher than Eagle's, we find that the decision to award the contract to Meridian was reasonable.

The protest is denied.

  
James F. Hinchman  
General Counsel